

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
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June 11, 1996

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Re: Public Works Case No. 96-006

Department of Corrections - Community Correctional Facilities

Gentlemen:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to 8 California Code of Regulations (C.C.R.) section 16001(a). Based upon my review of the information and documents submitted and the applicable laws and regulations pertaining to public works, it is my determination that the above project is a public works within the meaning of the Labor Code

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Research

The Facts

In October 1995, the California Department of Corrections (CDC) issued Request for Proposal (RFP) Number R95.099. The RFP calls for proposals for the "acquisition, construction and operation of at least four 500-bed "Community Correctional Facilities" in which to house medium-security male prisoners.

In summary, the RFP seeks bids for the construction of facilities and the provision of housing, sustenance and related services for inmates within those facilities for a period of ten years. The RFP specifies that, "Renovation of existing structures will not be accepted. Proposals must be for build-to-suit only." The RFP sought bids from private parties, profit-making or non-profit corporations, agencies, businesses or associations, precluding bids from public entities. The RFP allows for the possibility that the contractor that will provide housing and other services to the prisoners assigned will not itself construct the building or contract for it, but will lease the building from another entity which constructs the facility or contracts for its construction.

The RFP includes 28 specific and general requirements for each facility to be built. It sets out requirements for the ratio of sinks, showers, urinals and toilets per inmate; required minimum space for a bed and locker for each inmate; the number of parking spaces and the size of office and conference rooms for CDC employees to be assigned to each facility, janitorial closets, medical cells, classrooms, perimeter security, an armory, a power supply, sallyports and many other aspects of the facility.

The RFP describes the significant extent to which the CDC will exercise control over both the design and implementation of the administrative/management structure and the program to be carried out by the contractor. The RFP states that:

* Seven CDC "Parole Agents and correctional staff are permanently assigned and integral participants in a CCF's daily operation...."

* "Inmates at CCF's receive a wide variety of medical and dental care which is assigned, approved and monitored by the Chief Medical Officer (CMO) of the CCF's designated CDC hub institution (the prison closest to the CCF)."

* The Contractor, with CDC approval [emphasis added] will (1) develop and implement a suitable organizational structure with clear lines of authority; (2) assign responsibility and distribution of functions; (3) prepare a detailed description of the legal authority, responsibilities and duties of each CCF staff member;....The Contractor is responsible for the selection and evaluation of CCF staff in accordance with Board of Corrections standards [emphasis added].

* "All CCF employees must be approved in writing by CDC prior to reporting to duty."

* Staff selection and training must adhere to CDC mandates and requirements regarding the initial screening, testing and background investigations of all successful candidates considered for employment.

* "The Contractor must provide services to all inmates in accordance with Title 15, Department Operations Manual and the Statement of Work [a document attached to the RFP]. The required services...are summarized as follows:

2. Inmate Work/Training Participation - Full participation in the Inmate Work/Training Incentive Program with its nominal pay and day-for-day credit provisions. Each inmate will have a job or participate in some form of programming with the expectation that the inmate will spend at least six hours but no more than eight hours per day, five days per week.

4. Education A year-round education program including Adult Basic Education, English as a Second Language and GED (General Education Degree) preparation and testing.

7. Visiting - A minimum of 12 hours of contact visiting per week year-round in accordance with [Department of Operations Manual] section 54020.

The RFP includes numerous other specific operational requirements defined by the CDC.

The RFP contemplates that each company which receives a contract to operate a CCF will be paid by CDC on two distinct bases: First, after receipt of a detailed invoice, CDC will pay on a monthly basis an amount

based on a negotiated rate of payment per-inmate/per day. This amount may vary from year to year. Second, and of most importance here, the Department of Corrections will reimburse the business firm that constructs the facility for the full costs of construction, including land acquisition and construction permit costs. The RFP (and an amended RFP issued on April 30, 1996) describe the payment arrangements, taking account of two possible arrangements: (1) construction of the facility by the service contractor; and (2) construction of the facility by a third party, which then leases the facility to the service contractor for the required ten-year period.

In the event that the service provider itself constructs the facility, the agreement to be signed by CDC and the service provider states:

The State shall reimburse the Contractor monthly for actual facility lease/use costs at an amount not to exceed \$_____ per month. The amount paid to the Contractor will be adjusted to reflect the actual amortized cost for ten (10) years and cannot exceed the amounts reflected in the prestart-up budgets.

The RFP defines the prestart-up budget to include the cost of construction. The RFP states, "The construction component shall reflect all construction related costs necessary to make the CCF ready for occupancy by inmates. This shall also include costs for land acquisition, permits and site inspection." The RFP permits the contractor to include in the construction budget "contingency costs" arising from changing circumstances during construction of the facility. The RFP also notes, "If actual construction costs are lower than the proposal submitted, the amortized amounts reimbursed to the Contractor will be adjusted downward to reflect actual costs."

In the event that the operator of the facility does not itself construct the facility, but instead leases the facility from another business entity which has undertaken its construction, after activation of the facility, CDC will pay actual lease costs and additional amounts as reimbursement for property taxes and property insurance. The April 30 revised RFP states:

The facility lease amounts reflected in the Budget Proposal Alternative Attachments 2 through 2.8 shall not exceed the actual costs for property tax, property insurance, and actual costs of construction and permanent equipment fixtures amortized over a

120-month period. Interest included in amortization of costs must reflect current market value interest rates and shall not be inflated for additional profit margin.

The contract to be entered into by CDC and the successful bidders provides for CDC to terminate the services of the contractor with 30 days notice, and to then operate the facility and/or locate another service provider to operate the facility. CDC is not required to have or state a reason for the termination. If the facility is one that was constructed by the original operator, while CDC is operating the facility and after a new service provider begins to provide the services, the State will continue to make the agreed-upon amortization or "facility use" payments to the original contractor. The original contractor is required to lease the facility to the state-approved replacement operator for the entire term of the original ten-year contract. Similarly, if the facility is one that is being leased by the initial service provider from a third party, CDC will, after terminating its arrangement with the original operator, make full facility lease cost payments to the owner of the facility, throughout the remainder of the ten-year lease period. At the same time, CDC will endeavor to find a new facility operator.

The RFP provides that each bidder that intends to use a leased facility in which to provide services "must submit [with its bid] a document from the lessor agreeing to the termination provisions specified in the RFP."

Legal Analysis

Coverage of this project as a public work is supportable using several different analytical frameworks.

1. Construction of the facilities are to be paid for in whole or in part out of public funds.

Labor Code § 1720(a) generally defines public works to mean "construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds..."

Because of the agreement that the State of California will reimburse the service provider for all construction costs, the construction of the Community Correction Facilities is work that is paid for in whole or in part

out of public funds. While it is true that the State is not paying for the construction directly (the State is not making any payments directly to a licensed building contractor) nor is the State completing the payment for the construction at the time it occurs or shortly afterwards (the payments are to be made over a period of ten years), neither of those circumstances alters the central fact that it is CDC that is to pay virtually the entire costs of construction of the facility.

The Department of Corrections will not hold title to the facility or the land on which it is to be built.¹ Labor Code section 1720(a), however, defines "public work" without reference to the ownership of the facility being constructed, altered, demolished or repaired. Further, in Southern California Regional Rail Authority Lease of Union Pacific Right of Way (Nov. 30, 1993) the Director concluded that under the circumstances of that case the construction of new rail lines was a "public work" within the meaning of Labor Code Section 1720(a) despite the fact that the public agency did not have an ownership interest in either the land or the completed project. The director's decision noted that the language of Labor Code section 1720(a) does not require ownership to be present to establish a project as a public works project. The decision then noted that the public agency (a joint powers authority linking agencies of five counties) exercised extensive control over every aspect of the project "from inception to completion."

The circumstances are similar here. Through operation of numerous conditions set out in the RFP, CDC will maintain extensive and detailed control over construction of the facility, initial organization of the administrative and program structure, the design and implementation of the program carried out within the facility, control over the hiring of employees, and the decision about whether to allow the initial service provider to continue to operate the facility or to choose a replacement firm.

McIntosh v. Aubry (1993) 14 Cal. App.4th 1576, cited by the Department of Corrections in arguing that the work here is not a public work within the meaning of the Labor Code, does not consider or decide

¹ CDC will, however, maintain control over the use of the facility in various ways described above. CDC retains its right to terminate its agreement with the initial provider of services, and to then operate the facility itself or arrange for another service provider to use the facility, while the State continues to make construction cost amortization payments or lease payments.

the specific point raised here. In that case, the private developer paid for construction of the facility, in which it would care for youths assigned to it by the County, and was not reimbursed for the construction costs. Although in McIntosh the public agency waived certain fees usually required of private developers, waived its right to collect rent for use of the land for the first 20 years of the building's use, and lent the developer approximately \$70,000 to obtain performance bonds, the appellate court concluded that none of those acts amounted to payment of public funds that would bring the project within the definition of "public work." In the instant case, in contrast, the Department of Corrections has explicitly promised to reimburse the private developer for all projected costs of land acquisition and development. in addition to the monthly payments for services to be provided.

In several recent coverage determinations, the Department has decided that projects were public works within the meaning of Labor Code section 1720(a) because a public entity reimbursed a private entity for construction costs.

In Tustin Fire Station PW Coverage Determination Appeal No. 93-054 (July 1, 1994) The Irvine Company (TIC) and the City of Tustin entered into an agreement regarding commercial and residential development of a 2,000-acre area. As one aspect of this agreement, TIC agreed to construct a fire station within the area to be developed, and to convey the fire station to the city after its completion. The City agreed to reimburse TIC for the cost of construction of the fire station. The Director concluded that because of the reimbursement with public funds, construction of the fire station was a "public work" within the meaning of Labor Code Section 1720.

In Wal-Mart Shopping Center, City of Lake Elsinore, PW Coverage Determination No. 93-012 (July 1, 1994), the private developer of a shopping center agreed to construct off-site improvements (streets, sewer, water lines and storm drains). The city's Redevelopment Agency agreed to reimburse the private developer for these construction costs. The Director concluded that the off-site improvements for which the developer was to be reimbursed were public works within the meaning of Labor Code Section 1720.

In Pismo Beach Factory Outlet Center Project (PW Coverage Determination No. 94-034) (Sept. 19, 1994) the Redevelopment Agency

reimbursed a private developer for the cost of construction of a series of public improvements required in conjunction with the project. The Director concluded that because the public improvements were paid for in whole or in part with public funds those parts of the over-all project - but only those parts - were "public works" within the meaning of Labor Code section 1720.²

In two earlier coverage determinations involving CDC service contracts, this Department determined that certain payments to non-governmental entities did not bring those other activities within the scope of "public works" within the meaning of the Labor Code. In September 1989, the Department issued a determination concerning payments made by the Department of Corrections to the Wackenhut Corporation. From the brief description in the coverage determination letter, it appears that Wackenhut arranged to either build or lease a facility (the letter is ambiguous on this point) to be used as a "Return to Custody Facility." The Department of Corrections agreed to pay Wackenhut for the services Wackenhut provided to the state in that facility; the payments made by the Department included an amount designated as "rent reimbursement." These amounts were designed to "reimburse Wackenhut ... for Wackenhut's cost in leasing a facility in which to do business with the state." The Director determined that construction of the facility was not a public work under either Labor Code section 1720 or 1720.2 (which refers to leases by government agencies of privately owned facilities).

In Inmate Mother Work Furlough Center PW Coverage Determination No. 91-020A (Oct. 21, 1991), a non-profit organization known as "Friends Outside" signed an agreement with the Department of Corrections by which Friends Outside agreed to provide housing,

² In Redevelopment Agency for the City of Torrance, PW Decision No. 93-023 (October 4, 1993) the Redevelopment Agency agreed to reimburse a private developer for the cost of construction of condominium units and parking areas, street, sewer and water line improvements. Because public funds paid for these projects, they were viewed as "public works" within the meaning of Labor Code Section 1720. Because the City of Torrance is a charter city, however, which had adopted a resolution exempting itself from the prevailing wage laws, the payment of prevailing wages was not required.

sustenance, supervision and/or other services for selected female inmates and parolees. Friends Outside owned property and a building in which the services were to be provided. The Department of Corrections agreed to pay Friends Outside to provide the services described in the contract.

The organization signed a contract with a private contractor to undertake renovations on the building. A Carpenters Union organization asserted that the renovation work constituted public work within the meaning of Labor Code section 1720.2. The Director rejected this contention, relying on the fact that the contract between the Department of Corrections and Friends Outside was a contract for services, and was not a lease agreement within the meaning of Labor Code section 1720.2. The Director's decision did not rule on the question of whether the renovation work was a public work within the meaning of Section 1720.

Neither of these two decisions provides support for a conclusion that the construction of the Community Correctional Facilities at issue here is outside the definition of a public work. In each instance, CDC was paying a private contractor solely for services to be provided. The contracts entered into by CDC with the two private entities allowed for rent payments or the cost of renovations to be included in the calculations justifying the level of payment for the services. In the second instance, the Director did not consider or decide the question of whether the renovation work fit within the definition of "public work" set out in Labor Code section 1720.

In summary: (1) the construction of the community correctional facilities is to be paid for by public funds, by means of the monthly payments by the Department of Corrections to the contractor over a period of ten years, explicitly calculated to reimburse the contractor for all construction costs; (2) the statute does not require, under certain circumstances, that the facility being constructed be owned by a public agency for its construction to be viewed as a "public work; (3) the Department of Corrections is to exercise detailed and on-going control over the design and implementation of the program to be carried out within the facility; and (4) prior determinations support the conclusion that reimbursement by a public agency to a private entity supports a conclusion that a construction project is a "public work" within the meaning of Labor Code 1720

2. The Service Provider will at all times be acting only as an agent of the Department of Corrections.

CDC has the right to terminate its arrangement with the service provider at any time, and without statement of a reason, providing it gives the service provider 30 days' notice of the termination. After such a termination, the Department of Corrections has a continuing right to control the facility and to choose another service provider, and a continuing responsibility to make all remaining construction amortization payments or lease payments for the remainder of the ten-year period. If a termination occurs prior to completion of the ten-year period, the initial service provider must return to the State all supplies, equipment and materials for which the contractor has been or would be, reimbursed with state funds. All of this is true regardless of whether the facility is one which was constructed by the initial service provider, or was one leased to the service provider by a third party.

CDC has complete control over the service provider's selection of personnel who may work within the facility. The service provider must adhere to CDC standards in choosing employees, and CDC has specific control over every hiring decision - no employee may be hired without written approval of CDC.

From these specifics, the significance of which is reinforced by other aspects of CDC control over both design and control of the facility, and design and implementation of custodial, medical and other programs related to inmates, it is apparent that the service provider is nothing other than a carefully controlled agent of the Department of Corrections. Thus, while it may be the service provider that arranges for construction of the CCF, the Department of Corrections must be construed to be the "awarding body" in each instance (see Labor Code section 1722) and construction of the Community Correctional Facilities must be viewed as a public work.

3. The contractual arrangement between CDC and the service provider may be viewed as a lease.

Labor Code section 1720.2 defines "public works" to include construction that is done under contract by private parties if: (a) upon completion of the work more than 50 per cent of the assignable square feet of the property is leased to the state or a political subdivisions of

the state; and either (b) a lease agreement between the public entity and the lessor was entered into prior to the construction contract or (c) the construction work is performed according to plans, specification or criteria furnished by the public entity, and the lease agreement is entered into by the public entity and the lessor during or upon completion of the construction work.

Although there is no document here designated a "lease," all the conditions prescribed by the law are present here. Each CCF will be occupied and used exclusively by service providers carrying out detailed instructions of CDC, under the direct supervision of CDC. The agreements for use of these facilities will be entered into prior to commencement of construction of the facilities. CDC retains control over the use of the facilities, by its contractual rights to terminate its service agreement with the service provider, expel that service provider from the facility, and replace it with a different service provider. At the same time, CDC is obligated to pay lease payments or construction amortization payments for the full ten-year period called for by the initial agreement.³ Thus, the contractual arrangements place in CDC rights as strong as those of a primary lease holder who has sublet a facility to another party, while retaining the right to evict the subtenant at the sole discretion of the primary tenant.

In view of all the circumstances, the RFP and the contract to be signed by CDC and the service providers must be viewed as the equivalent of a lease meeting the conditions of section 1720.2, and construction of the CCF's must be viewed as "public works" for that reason, independent of the analysis above applying Labor Code section 1720.

* * * * *

The Department's arguments against coverage are based on inaccurate factual assertions and a failure to apply the Department's precedential decisions.

³ And, as noted above, the lease payments include payment of property tax and property insurance.

The May 1, 1996 letter from counsel for CDC states:

CDC would pay contractors on a per diem basis for each inmate housed at the CCF. This per diem would include reimbursement for pre-start up costs, including construction costs, amortized over a ten-year period.

While the first sentence quoted is correct, the second is not. The per diem payments are completely independent of the construction cost amortization payments, as is apparent in numerous provisions within the RFP, the contract to be signed by CDC and the successful bidders, and the budget proposal attachments distributed by CDC for use by bidders. If CDC were paying service providers only per diem payments for the provision of custodial services, there would be no question about the applicability of prevailing wage laws. It is precisely because CDC is reimbursing the service providers in full for the cost of construction, over and above its payments for the services provided, that the issue arises.

Counsel for CDC in his May 1, 1996 letter cites one sentence from the Director's determination in the Tustin Fire Station determination, PW No. 93-054 in support of a determination of non-coverage.

The character of funds used to pay for a project is dependent on the identity of the entity that bears the ultimate burden of paying for the project.

Counsel then fails to explain how this quote supports his position. If anything, the statement cited argues in favor of coverage. Because CDC will bear the ultimate burden of construction costs - from top to bottom, including land acquisition costs, inspection permit costs, and, in the case of a leased facility, property insurance and property tax - the CCF's are being paid for by public funds and, therefore, construction of the CCF's must be viewed as public works.

Any interested party may file an appeal regarding this coverage determination pursuant to 8 C.C.R. 16002.5. Such an appeal must be made within thirty days of the issuance of the coverage determination. The Notice of Appeal is required to state the full factual and legal ground upon which the determination is appealed and whether a hearing is desired. The decision on whether to hold a hearing is within

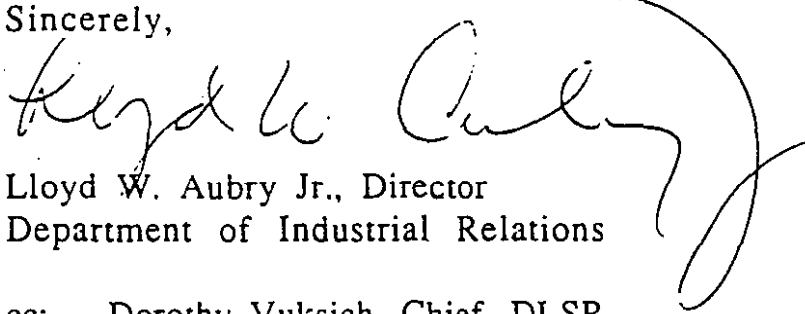
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the Director's discretion. A final administrative determination on an appeal is subject to judicial review by way of Writ of Mandate pursuant to the Code of Civil Procedure.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lloyd W. Aubry Jr.", written in dark ink.

Lloyd W. Aubry Jr., Director
Department of Industrial Relations

cc: Dorothy Vuksich, Chief, DLSR
John Duncan, Chief Deputy Director
Roberta Mendonca, Chief, DLSE
Rulon Cottrell, Chief, DAS
John Rea, Chief Counsel
Vanessa Holton, Assistant Chief Counsel